IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.35 OF 2005

Vasant Krishna More ... Petitioner

Vs.

Shankarlaxman Kasekar & Ors. ... Respondents

Mr. Uday Warunjikar for the petitioner.

None for the respondents.

CORAM : A.M. KHANWILKAR, J.

DATED : 10TH JULY, 2006.

P.C.:-

1. Heard counsel for the petitioner. None appears for the respondents though served and have entered appearance through the advocate.

2. For the nature of order that I propose to pass, it is not necessary to advert to the factual matrix of the case in-extenso. Suffice it to observe that the petitioner is the defendant in Special Civil Suit No.172 of 1990 filed by the respondents. The case of the petitioner is that this suit is filed as a counter blast to the suit filed by the petitioner. It is not necessary to examine this controversy. What is relevant for our purpose is that it is common ground that the suit summons in the suit instituted by the respondents was duly served on the petitioner. The petitioner entered appearance in the suit. The suit

proceeded further after filing of the written statement. However, on 12/8/1997, the suit came to be dismissed for default as none appeared before the trial court on that day. It appears that the respondents/plaintiffs on the same day later on filed an application for restoration of the suit. The following order was passed on that application :

> "Vide Order Rule 36, the suit is restored and the order of dismissal is set aside. Notice to Defendants".

3. This is the order noted on the application for restoration filed by the respondents/plaintiffs. The rozanama for 12/8/1997, however, records differently viz.

> "Appln. behalf of plff. for set aside dismissed order court passed order Exh.1 Set aside suit. Appln. by plff. for time Adjd. for hearing."

4. The fact remains that no notice was given to the defendant before the suit was restored to the file. Assuming that the court could have had restored the suit without notice to the defendant as none had appeared before the court on that day. Even so, after restoration of the suit, the defendant was required to be put to notice regarding restoration of the suit in terms of the order passed on the application for restoration on that day, which is reproduced earlier. That has not happened in the present case. Instead, the trial court proceeded with the suit by framing issue on 7/3/1999 requiring the

respondents/plaintiffs to adduce evidence. The suit under section 6 of the Specific Reliefs Act was eventually decreed by the judgment and decree dated 20/10/2000.

5. As mentioned earlier, the suit was restored to the file without notice to the defendant. Moreover, after restoration of the suit, no notice was given to the defendant in terms of order dated 12/8/1997. It is also not in dispute that the defendant did not adduce any evidence at the trial. If so, the decree as passed was obviously an ex-parte decree against the defendant within the meaning of Order XVII, Rule 2 of the CPC. Suffice it to observe that the fact that the notice was not served on the defendant is established on record. The counsel for the petitioner submitted that the said decree is an ex-parte decree within the meaning of Order XVII Rule 2 of the CPC. Counsel for the petitioner has relied on the principles expounded in the decisions on the point in issue.

6. The first of such cases is in the matter of ***Ramchandra Ramaji Khatik and others v. Sahadeo Gopala Koshti & Ors.***, reported in ***AIR (32) 1945 Nagpur 185***. The second decision is in the matter of Long ***Life Carpet Industries, Gaharpur and others v. Smt. Kesar Jahan***, reported in ***AIR 1988 Allahabad 55.*** The third decision is of the Delhi High Court in the matter of ***V. Bhagat v. Ms. Usha Bhagat***, reported in ***AIR 1987 Delhi 74*** and lastly the Division Bench decision of the Rajasthan High Court in ***Shishupal***

v. Manak Chand reported in ***AIR 1992 Rajasthan 57***.

7. I have no hesitation in accepting the grievance made by the petitioner that the judgment and decree as passed by the trial court in the facts and circumstances of the present case is illegal and cannot be sustained. There is manifest procedural error committed by the trial court in the conduct of the trial. The said error is a manifest error which has caused serious prejudice to the petitioner. In the circumstances, the revision succeeds. The impugned decree is set aside and instead, the suit is restored to the file to its original number. The trial court shall proceed with the further trial in accordance with law. No order as to costs. The registry to ensure that the record and proceedings is sent back to the trial court forthwith and, in any case, on or before 7/8/2006 as the parties will have to appear before the trial court at 11.00 a.m. on that day. The trial court may then proceed to assign appropriate suitable date for hearing of the suit.

8. Civil revision application is disposed of in the above terms.

C.C. expedited.

[A.M. KHANWILKAR, J.]